EXHIBIT A

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

GLENN TIBBLE, WILLIAM BAUER, WILLIAM IZRAL, HENRY RUNOWIECKI, FREDERICK SUHADOLC, HUGH TINMAN, JR., Plaintiffs, v. EDISON INTERNATIONAL, THE EDISON INTERNATIONAL BENEFITS COMMITTEE, EDISON INTERNATIONAL TRUST INVESTMENT COMMITTEE, SECRETARY OF THE EDISON INTERNATIONAL BENEFITS COMMITTEE, SOUTHERN CALIFORNIA EDISON'S VICE PRESIDENT OF HUMAN RESOURCES, MANAGER OF SOUTHERN CALIFORNIA EDISON'S HR SERVICE CENTER, Defendants.	Case No.: CV 07-5359 SVW(AGRx) ORDER GRANTING-IN-PART AND DENYING-IN-PART DEFENDANTS' MOTION TO DISMISS [7]

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I. INTRODUCTION

Plaintiffs Glenn Tibble, William Bauer, William Izral, Henry Runowiecki, Frederick Suhadolc, and Hugh Tinman, Jr. ("Plaintiffs") bring this class action suit on behalf of the Edison 401(k) Savings Plan ("Plan") and all similarly situated participants and beneficiaries of the Plan, against Defendants Edison International ("Edison"), Southern California Edison Company ("SCE"), the Southern California Edison Company Benefits Committee ("Benefits Committee") (incorrectly named in the Complaint as the Edison International Benefits Committee), the Edison International Trust Investment Committee ("Investment Committee"), the Secretary of the Southern California Edison Company Benefits Committee (incorrectly named in the Complaint as the Secretary of the Edison International Benefits Committee), Southern California Edison Company's Vice President of Human Resources, and the Manager of Southern California Edison Company's HR Service Center, collectively referred to as "Defendants."[1] Defendants now move to dismiss the class action Complaint for failure to state a claim under Fed. R. Civ. P. 12(b)(6). For the reasons set forth below, Defendants' Motion is granted-in-part and denied-in-part.

II. FACTUAL ALLEGATIONS

Plaintiffs are current or former employees of Midwest Generation, which is a subsidiary of the Edison Mission Group, a

[1] Class is not yet certified in this action.

division of Defendant Edison. (Comp., ¶ 10.) Plaintiffs are all alleged members of the Edison 401(k) Plan, to which they contribute.[2] In the instant action, Plaintiffs seek to recover damages pursuant to the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1132(a) for alleged financial losses suffered by the Plan, in addition to injunctive and other equitable relief based on alleged breaches of Defendants' fiduciary duties. 29 U.S.C. §§ 1104(a)(1), 1106(a). Defendant Edison is the parent of Defendant SCE and serves either directly or through SCE as sponsor of the Plan. (Id., ¶¶ 1, 12.)[3] Defendant Benefits Committee, which is comprised of persons appointed by SCE's Chief Executive Officer, is allegedly a named fiduciary and Plan Administrator. (Id., ¶ 15.) Defendant Investment Committee, comprised of persons appointed by the Chief Executive Officer of Defendant Edison, is also an alleged fiduciary of the Plan. (Id., ¶ 16.) All remaining Defendants are also alleged to be fiduciaries of the plan. (Id., ¶¶ 17-19.) SCE allegedly indemnifies all fiduciaries of the Plan against liability for their conduct as Plan fiduciaries. (Id., ¶ 20.)

As part of its compensation and benefits, Plaintiffs allege SCE offers certain employees the opportunity to participate in the Plan, which is a "defined contribution plan" as set fort in 29 U.S.C. §

[2] A 401(k) plan is an investment that allows employees to contribute their wages automatically from their paychecks on a pre-tax basis. These contributions are then often matched by the employer and participants allocate their accounts among available investments. See PBGC v. LTV Corp., 496 U.S. 633, 637 (1990) (discussing 401(k) investment schemes).

[3] Although initially identified as separate entities, Plaintiffs group together Edison and SCE in the allegations of their Complaint, referring to the two collectively as "SCE". (Complaint, ¶ 14.) Accordingly, when the Court references Plaintiffs' use of SCE in the Complaint, it refers to both Defendants.

1002(34); and also allegedly contains an "eligible individual account plan" under 29 U.S.C. § 1107(d)(3)(A). (Complaint, ¶ 27.) The Plan assets are allegedly held in a trust (the "Trust") established by SCE and the Plan's other trustees. (Id., ¶ 28.) The fees and expenses associated with the Plan are allegedly paid from the assets of the Trust, in which the Plan participants allegedly retain an undivided beneficial interest. (Id.) Participants may select from a variety of investment fund options, into which they may direct their contributions. (Id., ¶ 29.) Plaintiffs allege that SCE is obligated to pay the cost of administering the Plan, and repeatedly represented that it does so. (Id., ¶ 32.)[4]

Plaintiffs allege that Defendants engaged in a variety of activities in their management of the Plan which constitute breaches of fiduciary duties, including: (1) "surreptitiously caused [administrative] costs" of the Plan to be assessed against its participants' retirement savings; (2) impaired market returns by including actively managed retail mutual funds as plan investment options; (3) "subjected the Plan to excess and unreasonable fees and expenses collected by, and transferred among, Plan service providers as soft dollars to support undisclosed Revenue Sharing programs"; and (4) undermined returns to participants in the Edison International Stock Fund "by imprudent fund management." (Complaint, ¶ 2.) Plaintiffs allege that all of these actions reflect the Defendants' violations of their general fiduciary obligations imposed under §

[4] It is unclear to the Court whether the alleged obligation to pay the costs of administering the plan is premised on a statutory argument or on representations made in documents filed with the Department of Labor. The Court would request clarification of this issue in any amended complaint filed by Plaintiffs.

1104(a) and prohibited transactions under § 1106(a). (Id.) In addition to the general breaches alleged in the Complaint, Plaintiffs specifically allege that Defendants chose imprudent or unreasonably expensive investment options when compared to the alternatives available to 401(k) plans of the same or similar size and complexity. (Complaint, ¶¶ 68-81; 82-85; 86-87.) Furthermore, Plaintiffs allege that the fiduciaries of the Plan improperly used the participants' money to pay for the administrative expenses while simultaneously failing to disclose these details. (Id., at ¶¶ 52-61.) Additionally, Plaintiffs allege that the fiduciaries used the funds for purposes other than the participants' sole benefit. (Id., at ¶¶ 81-86.) The details of these allegations are further explicated in the discussion of Defendants' Motion.

Count I seeks money damages and appropriate equitable relief under ERISA § 502(a)(2), 19 U.S.C. § 1132(a)(2). (Complaint, ¶¶ 98-103.) Count II seeks equitable relief, including an accounting of transfers and payments involving the Plan mutual funds investments, a surcharge in the amount of any improper transfers or payments, and disgorgement of improper profits under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3). (Id. at ¶¶ 104-122.)

III. STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(b)(6) permits a party to move for dismissal of a claim where the complaint fails to state a claim upon which relief can be granted. Such a motion is meant to test the legal sufficiency of a complaint. Ieto v. Glock, Inc., 349 F.3d

1191, 1199-1200 (9th Cir. 2003). The Supreme Court recently revised the standard used to review motions to dismiss in Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955 (2007). In Twombly, the Supreme Court stated that "[f]actual allegations [of the Complaint] must be enough to raise a right to relief above a speculative level." 127 S. Ct. at 1965. A plaintiff may not obtain relief simply by attaching "labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Id. The newly adopted standard for a motion to dismiss requires the plaintiff to plead "enough facts to state a claim to relief that is plausible on its face." Id. at 1974. Consequently, a Rule 12(b)(6) motion should be granted where the plaintiffs have failed to "nudge[] their claims across the line from conceivable to plausible." Id. Similarly, "[d]ismissal can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." Balistreri v. Pacifica Police Dep't., 901 F.2d 696, 699 (9th Cir. 1990).

In analyzing a motion to dismiss, a court must accept the veracity of the well-pleaded facts as presented in the complaint, and will construe the allegations in the light most favorable to the plaintiff. NL Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986). The court is not required, however, to accept any conclusory legal allegations or unwarranted inferences set forth in the complaint. Nat'l Ass'n for the Advancement of Psychoanalysis v. Cal. Bd. of Psychology, 228 F.3d 1043, 1049 (9th Cir. 2000). See also Mitan v. Feeney, 497 F. Supp. 2d 1113, 1126 (C.D. Cal. 2007) (stating that "conclusory, boilerplate" language will not suffice). The Twombly standard must also be read in light of Fed. R. Civ. P.

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8(a)(2), which merely requires a "short and plain statement of the claim showing that the pleader is entitled to relief." Subsequent cases have demonstrated that the Supreme Court did not wish to drastically raise the pleading standards under Rule 8. See Erickson v. Pardus, 127 S. Ct. 2197, 2200 (2007) (stating that "the statement need only give the defendants fair notice of what the . . . claim is and the grounds upon which it rests." (internal citations omitted)). With these guiding principles in mind, the Court now turns to the claims set forth in the present Complaint.

IV. ANALYSIS

A. Alleged Fiduciary Status of Edison and SCE

Defendants first move to dismiss all claims against Edison and SCE because, they claim, Plaintiffs do not allege in the complaint that either acted as a "fiduciary in any capacity with respect to the conduct alleged." (Mot., at 6.) Instead, Defendants argue, Plaintiffs in this case merely alleg that Edison and SCE are sponsors of the Plan. (Id.) Accordingly, Defendants maintain that neither of these two parties can be a proper defendant for breach of fiduciary duty under ERISA § 502(a)(2) or § 502(a)(3).

It is well understood that Plaintiffs may bring suits under ERISA for breach of fiduciary duty only against a fiduciary. See Gelardi v. Pertec Computer Corp., 761 F.2d 1323, 1324-25 (9th Cir. 1985) (citing 29 U.S.C. §§ 1109(a); 1105(a)); Batchelor v. Oak Hill Med. Group, 870 F.2d 1446, 1448 (9th Cir. 1989) ("Suits for breach of

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ERISA fiduciary duty . . . may be brought only against persons definable as fiduciaries under ERISA. A non-fiduciary does not subject itself to liability simply by participating in a breach of trust by fiduciaries."); Thorton v. Evans, 692 F.2d 1064, 1077 (7th Cir. 1982)). ERISA defines a fiduciary as:

> [A] person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

29 U.S.C. § 1002(21)(A).[5] Under Ninth Circuit precedent, "[f]iduciary status under ERISA is to be construed liberally, consistent with ERISA's policies and objectives." Arizona State Carpenters Pension Trust Fund v. Citibank, 125 F.3d 715, 720 (9th Cir. 1997). A plaintiff attempting to confer fiduciary status upon a defendant must make affirmative allegations concerning that defendant's fiduciary status. See Carpenters Health and Welfare Trust Fund for California v. Tri Capital Corp., 25 F.3d 849, 857 (9th Cir. 1994) (noting dismissal was proper where plaintiff failed to exercise any of the control necessary for fiduciary status), *overruled on other grounds in* Southern California IBEW-NECA Trust Funds v. Standard Indus. Elec.

[5] There is no dispute that Defendants, as corporations, qualify as "persons" under the statute.

Co., 247 F.3d 920, (9th Cir. 2001). However, a party is not a fiduciary under ERISA when it performs mere ministerial duties or processes claims. See, e.g., Kyle Rys., Inc. v. Pac. Admin. Servs. Inc., 990 F.2d 513, 516 (9th Cir. 1993). ERISA regulations set forth the distinction between those duties that are substantive and those that are simply ministerial:

> Q: Are persons who have no power to make any decisions as to plan policy, interpretations, practices or procedures, but who perform the following administrative functions for an employee benefit plan, within a framework of policies, interpretations, rules, practices and procedures made by other persons, fiduciaries with respect to the plan:
>
> (1) Application of rules determining eligibility for participation or benefits;
>
> (2) Calculation of services and compensation credits for benefits;
>
> (3) Preparation of employee communications material;
>
> (4) Maintenance of participants' service and employment records;
>
> (5) Preparation of reports required by government agencies;
>
> (6) Calculation of benefits;
>
> (7) Orientation of new participants and advising participants of their rights and options under the plan;
>
> (8) Collection of contributions and application of contributions as provided in the plan;
>
> (9) Preparation of reports concerning participants' benefits;

(10) Processing of claims; and

(11) Making recommendations to others for decisions with respect to plan administration?

A: No. Only persons who perform one or more of the functions described in section 3(21)(A) of [ERISA] with respect to an employee benefit plan are fiduciaries. Therefore, a person who performs purely ministerial functions such as the types described above for an employee benefit plan within a framework of policies, interpretations, rules, practices and procedures made by other persons is not a fiduciary because such person does not have discretionary authority or discretionary control respecting management of the plan, does not exercise any authority or control respecting management or disposition of the assets of the plan, and does not render investment advice with respect to any money or other property of the plan and has no authority or responsibility to do so.

29 C.F.R. § 2509.75-8, D-2. Accordingly, although a party may have some role in the administration of a plan, such duties do not necessarily fall within the ambit of fiduciary roles under the ERISA statute.

Plaintiffs' Complaint contains a number of allegations relevant to this analysis. First, Paragraph 12 of the Complaint states that "[u]pon information and belief, pursuant to ERISA § 3(16)(B), Edison International serves as sponsor of the Plan either directly or through Southern California Edison Company." (Complaint, ¶ 12.) Furthermore, Plaintiffs allege that "[u]pon information and belief, Southern California Edison Company is the Sponsor of the Plan

pursuant to § 3(16)(B)." (<u>Id.</u> at ¶ 13.) In addition, Plaintiffs point to Paragraphs 15 and 16 of their Complaint. Paragraph 15 states:

> Defendants Edison International Benefits Committee f/k/a Southern California Edison Benefits Committee (the "Committee") is a named fiduciary and Plan Administrator. The Committee is comprised of persons appointed by Southern California Edison's Chief Executive Officer, and serve at his pleasure. Each member of the Committee is also named fiduciary of the Plan.

(Complaint, ¶ 15.) Similarly, Paragraph 16 of the Complaint states "Defendant the Edison International Trust Investment Committee (the "TIC") is a named fiduciary of the Plan. The TIC is comprised of persons appointed by the Chief Executive Officer of Edison International. Each Member of the TIC is also a named fiduciary of the Plan." (Complaint, ¶ 16.)

Defendants contend that there are insufficient allegations to connect their actions to any fiduciary duty. (Mot., at 6-7.) Defendants point the Court to the Ninth Circuit's decision in <u>Gelardi v. Pertec Computer Corp.</u> to support its assertion that an employer cannot simply be tagged with liability for the fiduciary acts of its employees. 761 F.2d at 1325 ("ERISA anticipates that employees will serve on fiduciary committees but the statute imposes liability on the employer only when and to the extent that the employer himself exercises the fiduciary duty allegedly breached."). Defendants are correct that the fiduciary duty does not merely attach vicariously to the employer. The Ninth Circuit in <u>Gelardi</u> went on to say, however, that the company itself could be liable as fiduciaries "with respect

to the selection of the Administrator." Id. In Gerlardi, the Ninth Circuit found that no such allegations were present, and, therefore, dismissal was proper. Id. This concept concerning governance over selection is supported in other Ninth Circuit cases as well. See, e.g., Batchelor, 870 F.2d at 1449 (noting that parties with authority to select and retain fiduciaries may be fiduciaries themselves with respect to selection and retention). Effectively, such reasoning merely stands for the proposition that an employer can only be liable for the role that it plays as a fiduciary.

In the present action, Plaintiffs allege that Edison is involved because its CEO appoints the members of the TIC. (Opp., at 3.) Similarly, Plaintiffs claim that SCE is involved because its CEO appoints those members of the Committee. (Id. at 3-4.) Accordingly, Plaintiffs argue that since the individuals who appoint the members of these committees are officers of the overarching companies, they are fiduciaries. Specifically, Plaintiffs argue that it is in the selection of the individuals to these committees that Edison and SCE violated their fiduciary duties. (Id. at 3.) As presented in the Complaint, and argued in Plaintiffs' Opposition, this selection and monitoring is the alleged basis of SCE and Edison's role as a fiduciary.

Defendants respond with two arguments. First, they contend that there are no cases imputing the actions of the individual officer on the actions of the companies Edison and SCE as a whole. (Reply, at 2.) Second, Defendants argue that even if the governing corporations may be held liable for the appointing those in charge, there are no allegations relating to a breach of fiduciary duty in appointment.

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On the first point, it would seem contradictory to allow for the breach of fiduciary duties by a corporation under principles espoused in Gerladi and Batchelor, but to hold that the officers are legally distinct from the corporation involved in the selection process. It is well recognized that a corporation can only act through the individuals who comprise its operation. See, e.g., New York Cent. & H.R.R. Co. v. United States, 212 U.S. 481, 492-93 (1989) ("Since a corporation acts by its officers and agents, their purposes, motives, and intent are just as much those of the corporation as are the things done.") (quoting Bishop's New Criminal Law, § 417). Insofar as Plaintiffs bring a claim alleging the breach of the fiduciary duty on the basis of appointment and selection, Defendants' first argument lacks merit.

The second argument Defendants raise, that there are no allegations relating to the breach of any fiduciary duties on the part of these officers even if their actions could be imputed to the corporation, has more merit. Plaintiffs do not point to any allegations concerning the actual breach of any fiduciary duties by the individuals. Instead, Plaintiffs rely on Paragraphs 15 and 16, which do allege that they have power over the selection and appointment of the members of the committees, but do not inform the parties of any alleged wrongful actions the officers took in appointing the individuals that they did. Even given the liberality of pleading requirements under Rule 8, the allegations set forth in the Complaint do not manage to put Defendants on notice of the wrongful conduct in which these officers allegedly engaged.

Plaintiffs maintain that a number of the allegations in its Complaint relate to the wrongful conduct of Edison International and Southern California Edison. (Opp. to Mot., at 5-6.) (citing Comp., ¶¶ 44, 57-58, 80-81, 60.) These allegations all relate to the wrongful actions undertaken by the committees or Defendants in their administration of the plan. However, they do not relate to the wrongful appointment or the fiduciary breach on the part of the corporations themselves. If the Court accepts the theory that the individual CEOs in charge of the appointment of the committees may be fiduciaries and therefore impugn the corporations as fiduciaries, then the allegations would have to relate to the duties and discretion those fiduciaries possess. The only duty of SCE and Edison, as currently alleged in the Complaint and argued in Plaintiffs’ Opposition, relates to the appointment process. Plaintiffs’ allegations concerning the divergence of funds, however, relate to the actions taken by the committee as violations of ERISA.[6]

Plaintiffs cite to the district court’s holding in Spano v. Boeing Co., 2007 WL 1149192 (S.D. Ill. April 18, 2007), as support for the proposition that fiduciary status is typically not appropriate to determine at a motion to dismiss stage. The court in Spano declined to dismiss allegations of fiduciary status with respect to Boeing where the plaintiffs alleged that Boeing was the plan sponsor and a fiduciary of the plan. Id., at *2. Plaintiffs

[6] Plaintiffs, as alleged in the Complaint, fail to state a connection between the status of Defendants SCE and Edison as fiduciaries and any breach. Plaintiffs allege that SCE and Edison are fiduciaries due to their selection and status as a plan sponsor. The Complaint, however, does not state any breach of fiduciary duty in the appointment of plan administrators, nor any role in monitoring the actions of those involved in administering the plan.

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additionally cite to an unpublished decision from the Northern District of California in which the district court declined to dismiss certain defendants as fiduciaries. Kawani v. Bechtel Corp., Case No. CV 06-5566 CRB, May 15 2007, Slip Op. at 7. The court in Kawani stated that it could not determine the roles of the respective parties at the motion to dismiss stage. In their Reply, Defendants distinguish Plaintiffs' citation to Kanawi by stating that the plaintiffs in that case relied on express language in the plan document granting the plan sponsor appointment authority. Kanawi, at 6. Additionally, Defendants cite to Tool v. Nat'l Employee Ben. Servs., Inc., 957 F. Supp. 1114 (N.D. Cal. 1996), for the proposition that fiduciary status may be determined at the motion to dismiss stage. In Tool, however, the Court concluded that defendant MassMutual could not be subject to ERISA liability as a fiduciary because such a finding was precluded by the Small Business Protection Act. 957 F. Supp. at 1119. Such a statutory preclusion is not argued by Defendants and does not appear to apply on face of the Complaint.

The Court agrees with Plaintiffs and other courts in this district that the fiduciary status of a party is typically not a matter fit for resolution at the motion to dismiss stage. The Court does find however, without conclusively addressing the fiduciary status of defendants Edison and SCE, that there is a dearth of allegations in the present Complaint that impugn any breach of fiduciary duty based on the role alleged. As the allegations fail to relate to the fiduciary duties that are presented in the Complaint, the Court will grant the motion to dismiss as to Count I for Breach of Fiduciary Duty against Edison and SCE but will also grant

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Plaintiffs leave to amend the complaint in accordance with the general practice under Rule 12(b)(6).[7]

B. Allegations Regarding Imprudent Transactions and Conduct

Defendants next present a general attack on the sufficiency of the allegations regarding imprudent transactions, arguing that Plaintiffs fail to allege adequate facts to meet requisite pleading standards. Plaintiffs contend that they have met the pleading requirements under Rule 8 by placing the Defendants on notice of the claims against them.

ERISA provides that a plan fiduciary shall act solely in the interests of the plan's participants and beneficiaries and in doing so must act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character with like aims." ERISA § 404(a)(1)(C); 29 U.S.C. § 1104(a)(1)(C). Accordingly, ERISA is "designed to promote the interests of employees and their beneficiaries in employee benefit plans." Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 90 (1983). As the Ninth Circuit has stated, "[t]he explicit language of this section indicates that the prudent

[7] Plaintiffs argue in their Opposition that Defendants Edison and SCE can be liable for the improper shifting of expenses whether they did so as fiduciaries, or as non-fiduciary parties-in-interest. (Opp., at 6.) (citing Rutledge v. Seyfarth, Shaw, Fairweather & Geraldson, 201 F.3d 1212, 1220-21 (9th Cir. 2000)). This claim is asserted as part of the equitable relief that Plaintiffs seek under Count II of the Complaint. A discussion of recovery under this theory against all Defendants is contained in Part VI, Sections C and E.

person test applies to fiduciary obligations under ERISA." Donavan v. Mazzola, 716 F.2d 1226, 1231 (9th Cir. 1983). In determining the existence of a breach of fiduciary duties, courts will examine whether the individuals who are identified as fiduciaries engaged in an appropriate investigation before the challenged transaction and will inquire into the merits of the transaction itself. Howard v. Shay, 100 F.3d 1484, 1488 (9th Cir. 1996).

Plaintiffs present a number of allegations relating to imprudent transactions that they believe demonstrate the Defendants' breach of their fiduciary duty. Plaintiffs argue that their Complaint alleges at least four challenges to the validity of the transactions. (Opp., at 9). Specifically, they allege that: (1) the Plan fiduciaries agreed to pay the "same retail prices for investment management as the smallest investors," claiming that a prudent investor would have obtained a lower rate given the Plan's size; (2) Plan assets were used to "generate monies . . . that were not captured for the benefit of the Plan and participants," instead of using those funds exclusively for the benefit of the Plan; (3) the Plan invested in mutual funds that both cost more than index funds and also failed to "outperform index funds over the long term," while a prudent fiduciary would have limited investment in the actively managed mutual funds; and (4) the Plan fiduciaries were using money for the benefit of the Plan sponsor, "instead of solely for the benefit of the participants." (Id. at 9) (citations omitted).

In rebuttal, Defendants assert that that Plaintiffs have failed to "allege facts that demonstrate that a hypothetical prudent fiduciary would have restricted the Plan's investment options solely

to those allegedly cheaper investments . . . ." (Reply, at 5.) Defendants maintain that a breach of fiduciary duty cannot be found given the "prevalence of retail mutual funds in 401(k) plans in general." (Id.) Additionally, they claim that, as to the third and fourth violation, Plaintiffs have only set forth the manner of the violation but not the amounts of these violations. (Id. at 5.)

Although nothing in the law requires that Defendants select the cheapest Plan options possible — as Defendants note in their briefing — the law does require that they prudently invest funds, as stated in Howard. 100 F.3d at 1484-89. Plaintiffs allege that the form of management that Defendants selected was not a prudent investment given the other options. Specifically, they allege that the use of these "retail" mutual funds and the actively managed funds violated their duty to act prudently. (See Comp., at ¶¶ 68, 71, 82-85.) This is more than a blanket statement that Defendants acted imprudently; instead, Plaintiffs have alleged the manner in which they believe that Defendants have acted imprudently. There are further allegations presented in the Complaint that outline what Plaintiffs allege constitute imprudent transactions. First, with regard to the claim that Defendants breached their fiduciary duty by obtaining merely retail rates, Plaintiffs present a number of specific allegations concerning the retail nature of the funds:

> 70. Defendants – as fiduciaries of a multi-billion dollar retirement savings plan – had enormous bargaining leverage in the investment marketplace. They squandered this leverage by subjecting the Plan and its participants to the high costs of

retail/publicly-traded mutual funds and failing to provide investment options with significantly lower costs.

71. As fiduciaries, Defendants were obligated to use the Plans' bargaining power to require that investment managers consider and provide separate low cost investment accounts, collective investment trusts, or common collective funds ("Separate Accounts") as Plan investment options.

(Id. at ¶¶ 70-71.) At this stage in the litigation it is reasonable that Plaintiffs cannot state with specificity the amount lost given the acts of the Defendants. Instead, Plaintiffs have alleged what they contend are imprudent transactions given the ability of the Defendants relative bargaining power and ability to obtain lower rates. They have also alleged the time period during which they believe that these imprudent transactions occurred. (Id. at ¶¶ 67-68.) In opposition Defendants point to no case law, and the Court is not aware of any, that would prohibit such a claim as set forth by Plaintiffs. As discussed previously, the mere fact that Defendants do not need to obtain the lowest rates does not mean that they may invest in any manner they see fit. Accordingly, the retail management allegations suffice to meet the pleading requirements of Rule 8, Twombly, and Erickson.[8]

Second, there are specific allegations relating to the violation of a fiduciary duty from the alleged failure to capture compensation

[8] In comparison to the example given by the Supreme Court in Twombly, Plaintiffs in this case appear to have pled more than sufficient allegations. Analogizing this case to a negligence action, Plaintiffs have not only pled negligence, but have also stated the manner in which they believe that negligence occurred, the actions undertaken by the Defendants and the given time period of the alleged breach of duty. See 127 S. Ct. at 1970 n.10.

streams for the benefit of the Plan. In Paragraphs 62-65, for instance:

62. Beyond collecting excessive fees from the Plan through Revenue Sharing programs, Plan service providers received additional, undisclosed compensation from their dealings with the Plan and Plan assets ("Additional Compensation Streams"). For example:

A. consultants receive finders' fees from investment managers for the consultants' placement of Plan assets with a certain investment manager or mutual fund company;

B. trustees or custodial banks perform cash sweeps of Plan accounts to capture cash before it is transferred to investment options, and earn interest on those cash holdings.

C. investment managers, custodial banks, prime brokers, and/or mutual funds receive payments for lending securities, owned by the Plan, to third parties; and

D. In connection with foreign investments, investment managers and mutual funds reap additional compensation from profiting on foreign currency exchange.

. . .

64. Plan fiduciaries must understand and consider these Additional Compensation Streams in fulfilling their fiduciary obligations to ensure that the proceeds of Plan assets are captured to defray Plan expenses and are applied solely for the benefit of the Plan and its participants and beneficiaries.

(Comp., ¶¶ 62-64.) Plaintiffs claim that by taking these actions Defendants' have obtained streams of revenue that they have failed to disclose and capture for the benefit of the Plan, and therefore Defendants violated their fiduciary duties. These allegations put Defendants on notice of the claims brought by Plaintiffs and the nature of the transactions that are the subject of the litigation.

Third, Plaintiffs present allegations relating to the "active management expenses." These allegations concern Plan investments in actively-managed mutual funds, which Plaintiffs assert is far more costly than passive management system where holdings are set to "a particular benchmark, such as an index . . . ." (Comp.,¶ 82.) Plaintiffs contend that by having these actively-managed funds in the Plan, Defendants require additional Plan funds to be spent without accruing any long-term gain in Plan assets. Specifically, Plaintiffs allege:

> 83. the inclusion of such actively managed funds in a plan of this size is detrimental to the interest of the Plan and its participants and beneficiaries. It repeatedly has been established that actively-managed funds rarely outperform such indexes on a risk adjusted basis when held as long-term investments, and that the average actively managed retail mutual fund underperforms the market after expenses. The Plan's Funds here, after fees for active management, consistently underperformed the market.
>
> 84. Defendants' inclusion in the Plan of these actively-managed mutual funds provided, and provides, no added value to participants while forcing them to bear substantial and

unnecessary fees. Over time and on a risk-adjusted basis, the Plan's actively-managed Funds have under-performed, and are known to perform, market returns by at least the level of such fee

(Id. at ¶¶ 83-84.) Additionally, Plaintiffs allege that the inclusion of these funds as an investment option "virtually guaranteed" that the participants would not receive a market return on their savings and, accordingly, Defendants' breached their fiduciary duty to the Plan and its beneficiaries. (Id. at ¶ 85.)

Defendants contend that the allegations relating to the additional compensation streams do not specify the "*amounts* paid to service providers and thus do not support a claim that the Plan paid unreasonable or excessive fees." (Reply, at 5.) Defendants also argue that it is industry practice to invest in mutual funds, a point which Plaintiffs contest. This Court need not decide at this stage whether the investment in mutual funds of the nature surrounding the Complaint here are sufficient to meet the duty. Plaintiffs have set forth allegations sufficient to raise an inference that the actions undertaken by Defendants in the present action state a claim for breach a fiduciary duty. While the claim as presented above appears rather tenuous, and it may well be that at the point of summary judgment there are not sufficient facts to support the allegations as set forth in the Complaint, given the deferential nature of review given to complaints in a motion to dismiss this Court does not find that Plaintiffs failed to state a claim for breach of fiduciary duty on this theory.

Finally, Plaintiffs generally allege that the Defendants breached their fiduciary duties because they used Plan funds in a manner not beneficial the Plan participants and beneficiaries. In support of their claim, Plaintiffs point to a number of allegations in the Complaint. Plaintiffs assert that allegations of revenue sharing could demonstrate a breach of fiduciary duty. (Comp., ¶ 58.) Plaintiffs further maintain that this revenue sharing system demonstrates the "flagrant self-dealing and self-interested" nature of the transactions, in breach of the duty. (Id. at ¶ 61.) Plaintiffs then attempt to tie the revenue sharing and self-interested nature of transactions to the use of mutual funds as a way to benefit Plan administrators by using Plan assets to pay fees and thereby reducing or eliminating "SCE's obligation to pay the administrative costs of the Plan." (Id. at ¶ 81.)

These allegations are sufficient to set forth a claim for breach of fiduciary duty on the basis of the self-interested nature of transactions and systems created by Defendants. In response, Defendants argue that the allegations concerning revenue sharing payments do not create any inference of "objectively unreasonable fees." (Id. at 5-6.) The allegations contend that by taking these actions Defendants have breached their fiduciary duties. Whether or not there were resulting unreasonable fees is difficult to ascertain at this point in the litigation, though, again, the allegations may prove unsubstantiated at the summary judgment phase.

Given the nature of the allegations as set forth in the Complaint and as discussed above, the Court finds that Plaintiffs have sufficiently alleged a breach of fiduciary duties by Defendants.

Whether or not these claims are substantiated on the merits, Plaintiffs have put the Defendants on notice of at least four ways in which they allege that Defendants have breached their fiduciary duty to the Plan participants and its beneficiaries.

C. Prohibited Transaction Claim

Defendants also seek dismissal on a separate basis of Plaintiffs' allegation claim alleging that Defendants "caused the transfer of Plan assets to, or the use of Plan assets by, [or] for the benefit of, parties in interest" in violation of 29 U.S.C. § 1106. (Comp., ¶ 60.) Section 1106 prohibits a fiduciary from causing a plan "to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect . . . transfer to, or use by or for the benefit of a party in interest, of any assets of the plan." 29 U.S.C. § 1106(a)(1)(A). This claim specifically arises from Plaintiffs' allegation that Defendants caused to be paid the Plan's administrative costs and expenses out of Plan assets via revenue sharing arrangements. These arrangements, Plaintiffs allege, involve Plan fiduciaries selecting investment options for the Plan, which in turn assess charges from Plan participants ostensibly to operate and manage these investment options. (Comp., ¶¶ 51-52.) Plaintiffs allege, however, that these investment options, as part of a scheme with Defendants, actually over-assess charges and direct some portion of the revenues assessed to pay the administrative costs and expenses of the Plan, which Edison and SCE themselves are required to pay. (Comp., ¶¶ 48-57.) Hence, though SCE and Edison do

not receive any Plan assets directly via this process, Plan assets were directed via these Revenue Sharing arrangements by Defendants to fulfill obligations owed by SCE and Edison. Therefore, Plaintiffs argue, these payments using Plan assets indirectly enriched SCE and Edison, who as employers constitute "parties in interest", in violation of Section 1106. 29 U.S.C. § 1002(14). (Opp., at 20.)

Defendants argue Plaintiffs' Section 1106 claim should be partially dismissed on the narrow ground that "once the Plan makes an investment in a mutual fund on behalf of a participant, the invested assets lose their status as Plan assets and become assets of the mutual fund itself." (Mot. at 23). Therefore, Defendants argue, as some of the payments at issue in this claim were paid out from mutual funds invested in by the Plan, they did not involve Plan assets and cannot create a claim. Defendants' sole basis for this conclusion is the language of 29 U.S.C. Section 1101(b)(1), which provides:

> In the case of the a plan which invests in any security issue by [a mutual fund], the assets of such plan shall be deemed to include such security, but shall not, solely by reason of such investment, be deemed to include any assets of such [mutual fund].

29 U.S.C. § 1101(b)(1).[9] Defendants argue this language indicates that the shares of the mutual funds purchased by the Plan become Plan assets, while all the Plan assets invested in mutual funds necessarily ceased to be Plan assets. However, the above language only indicates that the assets of a mutual fund do not become plan

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[9] Defendants also cite the Conference Committee Report detailing the legislative history of ERISA, but it merely echoes, in somewhat different terms, the cited language of Section 1101(b)(1). (Rep., at 11-12.)

assets “solely” by reason of a plan’s investment in such mutual funds. (Reply, at 11.) The language does not state that the assets of a mutual fund cannot in any way become the assets of a plan.

In this case, Plaintiffs are asserting a scheme in which Plan assets were, unbeknownst to Plan participants, funneled through mutual funds, in addition to other investments options, for the purpose of paying Plan administrative expenses and costs. Hence, Plaintiffs assert that the mutual fund assets at issue were Plan assets not solely on the basis that Plan assets were invested in the mutual funds, but instead on the basis that such assets were invested in the mutual funds pursuant to an illegitimate scheme whereby the assets were intended to be subsequently directed to pay SCE and Edison’s obligations. Section 1106 specifically prohibits both “indirect and direct” transfers “to . . . or for the benefit of a party in interest.” 29 U.S.C. § 1106(a)(1)(A). This language strongly indicates that Section 1106 is intended to pierce concealed indirect transfer arrangements such as are alleged by Plaintiff. This conclusion is further supported in some measure by the Ninth Circuit’s general admonishment, albeit in deciding a conceptually different issue, that the term “plan asset” is not specifically defined by ERISA and should be construed broadly in a functional manner to include any assets that “may be used to the benefit (financial or otherwise) of the fiduciary at the expense of plan participants or beneficiaries.” <u>Acosta</u>, 950 F.2d at 620; <u>see also</u>, <u>Kayes v. Pacific Lumber Co.</u>, 51 F.3d 1449, 1467 (9th Cir. 1994). Additionally, two District of Connecticut decisions cited by Plaintiffs have already recognized that revenue sharing payments,

such as are at issue here made to fiduciaries may potentially be considered prohibited transfers of plan assets. See Haddock v. Nationwide Fin. Servs., Inc., 419 F. Supp. 2d 156 (D. Conn. 2006); Phones Plus, Inc. v. The Hartford Fin. Servs. Group, Inc., 2007 WL 3124733, at *6 (D. Conn. Oct. 23, 2007). Defendants argue these cases should be distinguished because in both cases the assets at issue were being paid directly to fiduciaries. (Reply, at 12.) Plaintiffs by contrast have not alleged that the service providers receiving the assets are themselves the parties in interest, but that instead the payments to the service providers indirectly benefit SCE and Edison International as parties in interest. However, the indirect nature in which SCE and Edison are alleged to have benefitted from the payments is not relevant to the issue of whether the payments were Plan assets. Regardless, the holdings of Haddock and Phones Plus that indirect transfers of plan assets made through revenue sharing agreements with mutual funds are not outside the scope of Section 1106 remain applicable. Defendants, in contrast, cite to no case supporting their view that plan assets invested in a mutual fund can never be regarded as plan assets. Defendants instead rely on two inapposite district court cases, neither of which involves revenue sharing agreements such as are at issue here and neither of which holds that plan assets invested in a mutual fund can in no circumstance remain plan assets. (Mot., at 23.) See A. Ronald Sirna, Jr., P.C. Profit Sharing Plan v. Prudential Sec., 964 F. Supp. 147, 149 (S.D.N.Y. 1997); Corbett v. Marsh & McLenna Cos., 2006 WL 734560, at *2 (D. Md. Feb. 27, 2006). Therefore, the Court concludes that

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Plaintiff has adequately alleged a prohibited transaction pursuant to Section 1106.

D. Non-Disclosure Claims

Defendants assert that Plaintiffs have failed to adequately allege their claims concerning nondisclosures by Defendants. Defendants allege a large variety of nondisclosures by Defendants in the Complaint. (Comp., ¶¶ 93-97.) However, both parties appear to concede that Plaintiffs' multitude of nondisclosure allegations can be summarized as alleging that Defendants violated ERISA's general fiduciary duties of prudence and loyalty by not disclosing certain information regarding the nature, extent, and impact of the revenue sharing payments and additional compensation streams. (Mot. at 13; Plaintiff Opp., at 14-15.) Plaintiffs allege this information was material because it was "necessary for them: (a) to understand and protect their interests in the Plan; (b) to have knowledge regarding the Defendants' breaches of fiduciary duty; and (3) [sic] to have reason to believe they should make inquiry about those breaches and the facts underlying them." (Comp., ¶94.) Plaintiffs further allege that, as a result of Defendants nondisclosures, "Plaintiffs and all Plan participants and beneficiaries have been forced to pay excessive fees and expenses from their 401(k) accounts and have suffered financial losses and damages." (Comp., ¶ 97).

Plaintiffs do not allege that Defendants have failed to make any disclosures explicitly required by ERISA's detailed disclosure scheme or the Department of Labor regulations promulgated under that scheme.

See 29 U.S.C. Section 1021-31; 29 C.F.R. 2520.101-1, *et seq*. Instead, Plaintiffs only assert that Defendants' disclosures were mandated by ERISA's general fiduciary duties of prudence and loyalty. (Comp., at 26-27.) Defendants assert such a claim is insufficient as the Supreme Court has expressed reluctance to expand on the disclosure requirements created by ERISA through reliance on a different portion of the statute. Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73, 83-84 (1995). However, subsequent to its holding in Curtiss-Wright Corp., the Supreme Court has indicated that the general fiduciary duty imposed by ERISA can be used in certain circumstances to supplement legal duties specifically created by ERISA. Varity Corp. v. Howe, 516 U.S. 489, 504, 506 (1996). Applying common-law trust standards, while "bearing in mind the special nature and purpose of employee benefit plans," the Court found intentional misrepresentations made to beneficiaries to constitute violations of ERISA-imposed fiduciary obligations. Id. at 506 (quoting H.R. Conf. Rep. No. 93-1280, pp. 295, 302 (1974), 3 Leg. Hist. 4562, 4569.) In the same decision, the Court specifically declined to "reach the question whether ERISA fiduciaries have any fiduciary duty to disclose truthful information on their own initiative, or in response to employee inquiries." Id. However, the Ninth Circuit has subsequently determined that "ERISA imposes upon fiduciaries a general duty to disclose facts material to investment issues" even when such information is not specifically requested. California Ironworkers Field Pension Trust v. Loomis Sayles & Co., 259 F.3d 1036 (9th Cir. 2001); see also Washington v. Bert Bell/Pete Rozelle NFL Retirement Plan, 504 F.3d 818, 823 (9th Cir. 2007) ("[A] Plan

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fiduciary must disclose information that would be material to a reasonable participant."); Barker v. American Mobil Power Corp., 64 F.3d 1397, 1404 (9th Cir. 1995) ("A fiduciary has an obligation to convey complete and accurate information material to the beneficiary's circumstance, even when a beneficiary has not specifically asked for the information.").[10] The test for materiality is objective. Washington, 504 F.3d at 824. Hence, a fact is material if a reasonable participant would regard the fact as significant to their choices with regard to a plan. Id.

Defendants assert that Plaintiffs make only a conclusory allegation of materiality with regard to the alleged nondisclosures, which they view as insuffcient. (Mot., at 15-17.) However, as discussed above, Plaintiffs go beyond their initial general allegations of materiality and assert the specific basis for that conclusion. As the Court understands the allegations in the Complaint, Plaintiffs are essentially alleging that the Revenue Sharing payments and Additional Compensations Streams were in and of themselves violations of Defendants' fiduciary duties and hence

[10] There is some authority indicating "the general duty of disclosure is limited to information relating to the provision of benefits or the defrayment of expenses" and cannot be used to supplant an explicit disclosure requirement in ERISA. California Ironworkers, 259 F.3d at 1045; see also Bins v. Exxon Co. U.S.A., 189 F.3d 929, 938 n.5 (9th Cir. 1999); Hughes Salaried Retirees Action Comm. v. Adm. of Hughes Non-Bargaining Retirement Plan, 72 F.3d 686, 693 (9th Cir. 1995) (en banc). However, recent rulings have not applied these limitations. See Peralta v. Hispanic Bus., Inc., 419 F.3d 1064, 1070 (9th Cir. 2005); Washington, 504 F.3d at 818. In any case, whether these limitations are applicable is irrelevant in this case as the alleged nondisclosures all appear to fall within the proscribed area and Defendants do not assert that ERISA at this time possesses any explicit disclosure requirements that would be supplanted by the imposition of the general duty of disclosure in this case.

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knowledge of them was necessary for Plaintiffs to protect their interests in the Plan. In any case, Plaintiffs have alleged the materiality of the nondisclosures and the Court will not undertake a final determination of that materiality until both parties have had opportunity to present all the relevant facts.[11]

E. Appropriate Equitable Relief

Defendants also seek dismissal of Count II of the Complaint brought under ERISA Section 502(a)(3). (Comp., at 33.) Though Defendants air a number of arguments for dismissal of this claim, their central argument is that Count II seeks relief wholly

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[11] Defendants cite two out-of-circuit district court opinions that have dismissed similar claims at the motion to dismiss stage. (Mot., at 16-17.) However, in each, the primary reason for dismissal was the court's view that ERISA's explicit disclosure scheme cannot be expanded by reference to its imposition of general fiduciary duties. Hecker v. Deere, 496 F. Supp. 2d 967, 973 (W.D. Wis. 2007); Taylor v. United Techs. Corp., 2007 U.S. LEXIS 57807, at *13 (D. Conn. Aug. 9, 2007.). The Ninth Circuit, as already noted, has implicitly rejected this view. The court in Hecker does go on to note in dicta that it did not view information about revenue sharing payments as material to participants. 496 F. Supp. 2d. at 975-76. The court stated: "In assessing the likely return on an investment the fees netted against the return are certainly relevant, but knowing the subsequent distribution of those fees has no impact on the investment's value." Id. at 975 (citing In re Merrill Lynch Inv. Mgmt. Funds Secs. Liti., 434 F. Supp. 2d 233, 238 (S.D.N.Y. 2006); see also In re Morgan Stanley & Van Kampen Mut. Fund. Sec. Litig., 2006 U.S. Dist. LEXIS 20758, at *37-38 (S.D.N.Y. Apr. 18, 2006). Though, as already noted, the Court defers any determination of materiality to a later stage of the litigation, it does not view this reasoning as persuasive at this time. Though the subsequent distribution of the assessed fees may not as a general matter be material to participants, where, as alleged, that distribution diverges from that represented to or understood by participants, it would appear relevant to determining whether the assessed charges are appropriate.

duplicative of Count I. (Mot., at 18). Section 502(a)(3)) authorizes "a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan." 29 U.S.C. § 1132(a)(3). In Varity Corp. v. Howe, the Supreme Court described Section 502(a)(3) as a "catchall" provision that acts "as a safety net, offering appropriate equitable relief for injuries caused by violations that § 502 does not elsewhere adequately remedy." 516 U.S. 489, 512 (1996). The Supreme Court therefore explained:

> We should expect that courts, in fashioning "appropriate" equitable relief, will keep in mind the "special nature and purpose of employee benefit plans," and will respect the "policy choices reflected in the inclusion of certain remedies and the exclusion of others." Thus, we should expect that where Congress elsewhere provided adequate relief for a beneficiary's injury, there will likely be no need for further equitable relief, in which case such relief normally would not be "appropriate."

Id. at 515 (internal citations omitted). The Ninth Circuit has since repeatedly recognized that Section 502(a)(3) claims may not be brought where ERISA otherwise provides a remedy. See Bowles v. Reade, 198 F.3d 752, 760 (9th Cir. 1999); Ford v. MCI Comm'ns Corp. Health & Welfare Plan, 399 F.3d 1076, 1083 (9th Cir. 2005); Forsyth v. Humana, Inc., 114 F.3d 1467, 1475 (9th Cir. 1997); Egashira v. Boeing Co., 16 Fed. Appx. 808, 809 (9th Cir. 2001) (unpublished decision). Defendants argue that, as Plaintiffs have sought the same relief for

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the same alleged violations of ERISA under Section 502(a)(2) in Count One that they seek under Section 502(a)(3) in Count Two, Count Two should therefore be dismissed. (Mot., at 19.)

Plaintiffs do not contest the "catch-all" nature of 502(a)(3). Plaintiffs instead first argue that they should not be prohibited from *pleading* a Section 502(a)(3) claim as an alternative to its Section 502(a)(2) claim even if they cannot get relief under both claims. See Ehrman v. Standard Ins. Co., 2007 WL 1288465, at *4 (N.D. Cal. May 2, 2007) (allowing a party to plead a claim under an ERISA "catch-all" provision in the alternative because it was not certain that such a provision would not be necessary to provide all the relief sought). (Opp., at 16) However, alternative pleading is only warranted if there is some possibility that Plaintiffs will be unable to receive all the relief they seek under Section 502(a)(2). Section 502(a)(2) provides for the making good to the Plan any losses resulting from the alleged violations of fiduciary duty, as well as "any equitable or remedial relief the court may deem appropriate." 29 U.S.C. §§ 1109, 1132. This is precisely the relief sought under Count I. (Comp., ¶ 103.) Furthermore, upon review of the Complaint, the Court sees no relief requested under Count II that is not also requested under Count I. The only request for relief appearing in Count II that is not specifically requested in Count I is Plaintiffs' request for "an accounting of all transactions, disbursements and dispositions occurring in, in connection with, and/or in respect of, the Plan and its assets." (Comp., ¶ 118.) As Plaintiffs argue that the granting of such relief for Defendants' alleged violations of ERISA is equitable and necessary to grant the other relief requested,

such relief is necessarily included in Plaintiffs' general assertion in Count I that "Defendants are personally liable for any other available and equitable relief." (Comp., at 32, 34.)[12] Such relief should therefore also be available under Section 502(a)(2) to the same extent it is available under Section 502(a)(3).

Plaintiffs' note, however, that all the relief they seek may not be available under Section 502(a)(2) because certain defendants, most probably SCE and Edison, may ultimately be found to not be fiduciaries of the Plan, therefore leaving Plaintiffs with no remedy against them under Section 502(a)(2).[13] (Opp., at 17) In such a case, Plaintiffs would generally have no remedy against those defendants under Section 502(a)(3), as well. See Ford, 399 F.3d at 1082 ("To establish an action for equitable relief under . . . 29 U.S.C. § 1132(a)(3), the defendant must be an ERISA fiduciary acting in its fiduciary capacity, and must violate ERISA-imposed fiduciary obligations [.]" (quoting Mathews v. Chevron Corp., 362 F.3d 1172, 1178 (9th Cir. 2004)). However, it has been repeatedly recognized that a beneficiary may bring a prohibited transaction claim against non-fiduciary parties-in-interest, such as potentially SCE and

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[12] Defendants, in fact, concede that the requested accounting "would be a necessary element of any damage award under Count One." (Rep., at 20.)

[13] Plaintiffs additionally argue that, since the language of Varity does not categorically prohibit relief under Section 502(a)(3) where other relief is available, the Court should allow its Section 502(a)(3) claim to proceed past the pleading stage so that further facts can be developed, potentially creating circumstances where Section 502(a)(3) relief is appropriate. (Opp., at 17-18.) However, as already noted, the Ninth Circuit has subsequently applied Varity in a categorical fashion on multiple occasions. Furthermore, Plaintiffs do not even speculate as to what facts upon further development will create circumstances making equitable relief appropriate or as to what those circumstances might be.

Edison, for equitable relief under Section 502(a)(3). See, e.g., Everhart v. Allmerica Financial Life Ins. Co., 275 F.3d 751, 753-54 (9th Cir. 2001) (citing Harris Trust & Savings Bank v. Salomon Smith Barney, Inc., 530 U.S. 238, 247 (2000)); Landwehr v. DuPree, 72 F.3d 726, 734 (9th Cir. 1995). Therefore, it would appear that alternate pleading is warranted in this action at minimum with regard to Plaintiffs' prohibited transaction claims against SCE and Edison. As such, dismissal of Count II is inappropriate at least until such time as all Defendants are determined to be fiduciaries of the Plan.[14]

IV. Conclusion

For the reasons stated above, Defendants' Motion to Dismiss is GRANTED-IN-PART and DENIED-IN-PART. Plaintiffs have twenty (20) days from the date of this Order to file an amended complaint providing appropriate allegations regarding Defendants Edison and SCE.

IT SO ORDERED.

DATED: July 15, 2008

STEPHEN V. WILSON
UNITED STATES DISTRICT JUDGE

[14] Defendants additionally raise several arguments contesting whether certain aspects of the relief sought by Plaintiffs under Count II would be equitable. (Mot., 20-22.) Whatever the persuasiveness of these arguments, it would be premature to consider them at this point in the litigation. Plaintiffs have established that their request for equitable relief under Count II as a whole is not subject to dismissal. The Court will determine what parts of the specific relief Plaintiffs seek under Count II are equitable at such time as the Complaint's allegations of liability are proven.